IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:17-cv-189

JONES, DEVON V. NATURAL PERSON DBA DEVON V JONES, Plaintiff, vs. NATIONWIDE ADVANTAGE MORTGAGE COMPANY, Defendant.	**BRIEF IN SUPPORT OF MOTION TO DISMISS**

NOW COMES Defendant Nationwide Advantage Mortgage Company ("NAMC") pursuant to LR 7.3(c) and 7.2 and provides the following in support of its motion to dismiss the Complaint in this action:

STATEMENT OF THE CASE

Plaintiff, who identifies himself as "Jones, Devon V. natural person dba DEVON V JONES" commenced this action on February 2, 2017 in Guilford County District Court by the filing of a Complaint. The Complaint, which includes numerous attachments[1], is an effort to negate a mortgage loan balance exceeding $70,000 by manipulating the concept of an accord and satisfaction by negotiable instrument codified in North Carolina's version of the Uniform Commercial Code, N.C. Gen. Stat. § 25-3-311.

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[1] Interestingly, one of the attachments to the complaint asserts that "THERE IS NO LAWFUL MONEY." Compl. at 9, Affidavit of Rights to Open Court of Justice.

NAMC removed the action to this court on March 8, 2017 and has moved to dismiss the action pursuant to Rule 12(b)(6).

STATEMENT OF FACTS

The Complaint alleges that the Plaintiff disputed a debt, purportedly owned by NAMC, during a phone call on August 11, 2016. While the Complaint only vaguely identifies the debt, the Plaintiff attached a payoff statement provided to the Plaintiff by NAMC dated August 11, 2016 as Exhibit B. The payoff statement identifies the loan by account number and shows that the amount owed by Plaintiff to NAMC as of September 1, 2016 was $70,444.61. It specifically states, "*This is not a request to pay off your loan with us*." (Compl., Ex. B, p. 1.) (Emphasis original.)

Plaintiff alleges that he "disputed the Defendant's balance amount" during a phone call he initiated to NAMC. (Compl. ¶ 4.) He does not allege any facts regarding why he disputed any amount due. He does not allege that the debt was paid in full, was paid in advance, or that the debt was not enforceable for any reason. He only alleges that he "disputed" the debt, but provides no factual allegations for why or how the debt was disputed.

Plaintiff goes on to allege that after he received the payoff statement attached as Exhibit B, he submitted a payment in the amount of $835.00 by means of a money order and that on the face of the money order, he wrote the words "tendered as full satisfaction of claim." (*Id*. Ex. C.) He does not allege any facts regarding why he did this, why he made a payment of $835 and not some other amount, or why $835 was a good faith offer to resolve a debt shown by the payoff statement to exceed $70,000.

Plaintiff goes on to allege that he submitted a second money order payment in the amount of $835 on or about September 19, 2016, and that this second money order also bore the phrase "tendered as full satisfaction of claim." (*Id*. ¶ 6, Ex. D.) As with the August payment, Plaintiff does not allege any facts as to why he submitted this second payment or why if he believed the August payment to be a payment "in full" he felt any reason for the second payment to be made.

Following the submission of these two payments, Plaintiff alleges that he sent a series of documents purporting to establish the existence of a dispute between him and NAMC regarding whether his more than $70,000 debt was not paid in full thanks to one or both of the $835 payments he made. He alleges sending three "notice[es] of payment dispute" to NAMC's President on October 12, November 8, and November 28. (*Id*. ¶¶ 8-10, Ex. E, F, and G.) All of these notices are substantially identical and allege that Plaintiff's $835 payments extinguished his debt. He followed these three notices with a "notice of intent to sue" (*id*. ¶ 11, Ex. H), then filed a complaint with the North Carolina Department of Justice Consumer Protection Division (*id*. ¶¶ 12-13, Ex. I). This suit followed, and Plaintiff now seeks to recover compensatory damages in the amount of $1,000 "for all payments made after the acceptance of money order tendered for accord and satisfaction" [sic], the release of a lien and clear title to property located at 1728

Rockford Street in Winston-Salem, NC, modification to his credit reporting, and punitive damages in the amount of $50,000. (*id.*at 3, ¶¶ 1-4.)

The loan that is at issue in the case was originally made on July 20, 2007 when Plaintiff borrowed the original principal sum of $78,000 from NAMC pursuant to a fixed rate note to be repaid plus interest at 7.75% per year over a term of 30 years ("the Note"). (Motion to Dismiss, Ex. A.) The Note is secured by a deed of trust recorded in the Forsyth County Register of Deeds records in Book RE 2770 at Pages 2118-2135, which claims an interest in a parcel of real property located in Winston-Salem that has a street address of 1728 Rockford Street ("the Deed of Trust"). (*Id.*, Ex. B.)

ARGUMENT

This action is a blatant attempt to use North Carolina's statutory accord and satisfaction procedure in an effort to negate a debt in bad faith. The Court should dismiss the action because the Complaint fails to allege sufficient facts to plausibly state a claim for relief. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A complaint will not survive

Rule 12(b)(6) review where it contains "naked assertion[s] devoid of further factual enhancement." *Id.* at 557.

Further, even though a *pro se* litigant's complaint is entitled to wide latitude, the Court must still apply the same standard of review. *See Johnson v. BAC Home Loans Servicing*, 867 F. Supp. 2d 766, 776 (E.D.N.C. 2011) ("Notwithstanding the court's obligation to liberally construe a *pro se* plaintiff's allegations, however, the court is not required to accept a *pro se* plaintiff's contentions as true, and cannot ignore a clear failure to allege facts which set forth a claim cognizable in a federal district court.") (citations omitted).

I. The Complaint fails to state any cause of action upon which relief may be granted.

Reduced to its simplest terms, Plaintiff seeks to recover damages, the release of a deed of trust, and an injunction to compel credit reporting merely because he tendered two payments that did not remotely come close to paying in full a thirty year fixed rate mortgage loan. The Complaint does not designate any causes of action. Notably, while the Complaint demands $1,000 "for all payments made after the acceptance of money ordered tendered for accord and satisfaction," the Complaint cites no legal authority, statutory or otherwise, as the basis for this demand. The Complaint demands payment of $50,000 as "punitive damages" but does not allege any of the grounds for an award of punitive damages under Chapter 1D of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 1D-15 (stating that punitive damages are only recoverable under state law if the defendant is first liable for compensatory damages and the plaintiff demonstrates one of three aggravating factors by clear and convincing evidence.)

Plaintiff demands that NAMC be compelled to report to "all credit agencies" that Plaintiff's loan was "fully satisfied on August 23, 2016." Credit reporting is regulated by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). "The FCRA is a comprehensive statutory scheme designed to regulate the consumer reporting industry." *Ross v. Federal Deposit Ins. Corp.*, 625 F.3d 808, 812 (4th Cir. 2010) (citing 15 U.S.C. § 1681(a)). Indeed, "[t]he FCRA 'has been drawn with extreme care, reflecting the tug of the competing interests [between consumers and creditors],' and courts must respect the balance struck by Congress when interpreting its provisions." *Ross*, 625 F.3d at 812 (quoting *Nelson v. Chase Manhattan Mortgage Corp*., 282 F.3d 1057, 1060 (9th Cir. 2002)). The FCRA regulates three types of entities: consumer reporting agencies (CRAs), users of consumer credit reports, and entities that furnish debt information to CRAs, or "furnishers." *See* 15 U.S.C. §§ 1681a *et seq*.; *Wenner v. Bank of America, N.A.*, 637 F. Supp. 2d 944, 951 (D. Kan. 2009); *Barkho v. Homecomings Fin., LLC*, 657 F. Supp. 2d 857, 864-65 (E.D. Mich. 2009).

Based on the content of Plaintiff's demand, Plaintiff must be attempting to assert that NAMC is a "furnisher" under FCRA, however Plaintiff alleges no facts that NAMC has reported anything inaccurately to a CRA or that Plaintiff has complied with any of the provisions of FCRA that relate to disputing information reported by a credit reporting agency. *See* 15 U.S.C. § 1681s-2(b) (setting forth the process of submitting a dispute through a credit reporting agency as a pre-requisite of asserting any claim against a furnisher of information for failing to correct reporting or failing to conduct an investigation).

Plaintiff argues that he is entitled to the relief outlined above under the theory that he has negated his entire debt through the use of a procedure outlined in N.C. Gen. Stat. § 25-3-311, which provides a statutory means of resolving disputed debts through the use of a negotiable instrument. The statute, which is entitled "Accord and satisfaction by use of instrument" provides as follows:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
> (b) Unless subsection (c) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
> (c) Subject to subsection (d) of this section, a claim is not discharged under subsection (b) of this section if either of the following applies:
> (1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
> (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement complying with clause (i) of subdivision (1) of this subsection.

> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

N.C. Gen. Stat. § 25-3-311(a).

Nothing in § 25-3-311 creates an affirmative claim for relief, provides for any award of damages, or compels any form of credit reporting. In fact, the doctrine of accord and satisfaction is an affirmative defense to enforcement of a contract, not a cause of action. *See Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969). Accordingly, Plaintiff's attempt to use § 25-3-311 to create a cause of action where none exists is grounds alone for dismissal of this action.

Even were this Court to find that under some theory, the Plaintiff can use § 25-3-311 as an affirmative means of suit, the Complaint in this action fails to allege sufficient facts to demonstrate that § 25-3-311 should even apply. Use of § 25-3-311 as a defense to enforcement of an claim requires that the Plaintiff allege facts to demonstrate that tendering a payment as an accord and satisfaction was done "in good faith" and it must be done as a means of resolving an actual, existing dispute over an "unliquidated" debt (i.e. one that is indeterminate). Here, the Plaintiff alleges in conclusory fashion that he unilaterally disputes the amount of the debt but provides no facts to demonstrate how and fails to allege any facts to show that the debt itself is "unliquidated" and not capable of being easily calculated. In fact, Plaintiff's attachment of a payoff statement actually demonstrates the reverse. Accordingly the Complaint fails to state a claim.

"Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute." N.C. Gen. Stat. § 25-3-311, Official Comment 4, (quoted by *Hunter-McDonald, Inc. v. Edison Foard, Inc.*, 157 N.C. App. 560, 563, 579 S.E.2d 490 at 492 (2003). Plaintiff asserts that he disputes the amount of his debt, but alleges no facts to support this allegation. The Note itself shows that this debt was incurred in July, 2007, that the original amount of the debt was $78,000, that the debt was to be repaid over a course of 30 years, and that the debt was to be repaid with interest in the amount of 7.75% per annum. Plaintiff attaches as an exhibit to his complaint a payoff statement provided by NAMC showing that the payoff of the loan as of September, 2016 was $70,448.61. (Compl. Ex. B.) Further, the payoff statement itself says that it was not a demand for payment. (*Id.*) The statement was provided at the Plaintiff's request, and there are no allegations that following receipt of this statement any negotiation between Plaintiff and NAMC took place regarding the debt.

While the Plaintiff alleges that during a phone call he initiated, he disputed the amount due, he alleges no facts about how NAMC's statement of the debt was wrong, whether the debt had been paid, or why the debt would be in dispute. Plaintiff then attempts to negate this 30 year loan by tendering a payment of $835, but alleges no facts as to why a payment of that amount would be a good faith payment intended to resolve this long term debt obligation.

At common law, the concept of "accord and satisfaction" was a method of discharging a contract whereby the parties enter into a new contract to give and accept something in settlement of a claim. *Witten Supply Co. v. Redmond*, 11 N.C. App. 173, 180 S.E.2d (1971). For the defense of an accord and satisfaction to bar collection of a debt, the debtor bears the burden of proving the existence of both (1) an agreement by the creditor to accept something other than what he is demanding and (2) performance of the agreement by the debtor. *Fruit & Produce Packaging Co., Div. of Inland Container Corp. v. Stepp*, 15 N.C. App. 64, 67, 189 S.E.2d 536, 537 (1972). An accord and satisfaction is, therefore, dependent on there being some evidence of mutual agreement to resolve a dispute. It cannot be foisted unilaterally by one party.

When pleading the defense of accord and satisfaction, Rule 8 requires a pleader to set forth sufficient facts to demonstrate the existence of both the elements of agreement and performance. *Id.* at 66. In *Fruit & Produce Packaging Co.*, the Court of Appeals held that an answer setting up the defense of accord and satisfaction that merely asserted negotiation of a check with language stating "By indorsement this check when paid is accepted in full payment of the following account" was insufficient to provide adequate notice of the basis for the defense of accord and satisfaction. *Id.* In that case, the defendant purchased produce but notified the seller that much of the produce was damaged, then tendered a check for less than the amount claimed due and refused to pay the full contract price. The Court of Appeals found it significant that there was nothing pled, nor any evidence submitted, to show any negotiation of an agreement to resolve a legitimately disputed claim. *Id.* at 68. Instead, the Court of Appeals held that under the facts of *Fruit & Produce Packaging Co.*, the recipient of the check was justified in accepting the payment under the belief that there had been a mistake by the debtor. *Id.*

Similarly, in *Hunter-McDonald, Inc.*, the Court of Appeals held, under § 25-3-311, that transmission of a check stating "full and final payment" alone was not enough to prevent collection of the full amount of a debt where there was no evidence that prior to transmission of the check an actual dispute existed between the parties. 157 N.C. App. at 564. In *Hunter-McDonald, Inc.* a subcontractor claimed to be owed $34,250 but was only paid $11,500 by a general contractor with a check that read "full and final payment." The Court of Appeals did not give the general contractor the benefit of a defense under § 25-3-311, because the facts indicated that the general contractor sent the check without there being any evidence of an actual dispute prior to the payment. *See also In re Foreclosure of a Lien by Five Oaks Rec. Ass'n*, 219 N.C. App. 320, 327, 724 S.E.2d 98, 103 (2012) ("*In re Five Oaks*") (no accord and satisfaction based on a check reading "full payment" when check was not accompanied by any correspondence or documentation expressing the payor's "dissatisfaction with the amount of the debt"); *Snow v. East*, 96 N.C. App. 59, 384 S.E.2d 689 (1989) (no accord and satisfaction based on a check reading "In Full [For] Food, Clothing, etc." tendered to a decedent's caregiver for a debt of $47,400 for care giving services where the evidence showed the check could have been interpreted as only being payment for specific items).

In re Five Oaks is a good example of a situation like the one Plaintiff asserts. In that case, a homeowner fell behind on homeowner association dues and received bills along with threats that the HOA would foreclose to satisfy their unpaid assessments. The homeowner tendered a check marked "full payment" without any further explanation for an amount less than what the HOA demanded and later tried to prevent foreclosure by asserting the debt had been settled. The Court of Appeals held that transmission of the check alone was not enough to demonstrate the existence of a bona fide dispute. Here, the Plaintiff makes the conclusory allegation that he "disputes" the amount due, but provides no explanation for why. Absent factual allegations to provide fair notice of the basis for his assertion of the application of § 25-3-311, the Complaint fails to state a claim, even assuming this Court were to find that it was possible to affirmatively sue for an accord and satisfaction, which is the opposite of how the statute itself is structured.

In candor to the Court, there are examples where tendering a check marked "paid in full" or words to that effect do succeed in providing a defense under the doctrine of accord and satisfaction, but those cases are distinguishable and do not save this Complaint from the lack of sufficient factual allegations to state a claim for affirmative relief. For example, in *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980), the Court of Appeals held that payment of a painting invoice with a check that read "painting in full" constituted an accord and satisfaction as a matter of law. Significant to that case, however, were specific allegations and evidence that the parties to the agreement negotiated regarding the amount the painter should have been paid. *Barber*, 46 N.C. App. at 111. *See also Sanyo Electric, Inc. v. Albright Distributing Co.*, 76 N.C. App. 115, 118, 331 S.E.2d 738, 740 (1985) (holding that acceptance of a check marked "in full, final and complete settlement of all amounts owed" was sufficient to serve as an accord and satisfaction where the evidence showed that the parties had negotiated an agreement for the specific amount of the check). *Barber* and *Sanyo Electric* demonstrate that for negotiation of a check marked "paid in full" to serve as an accord and satisfaction, there must be both allegations and evidence demonstrating a legitimate dispute, not merely a unilateral declaration that a debt is "disputed."

Plaintiff here seeks to abuse the process of accord and satisfaction provided by § 25-3-311 without making any specific allegations to substantiate that the tender of $835 was done in good faith, which is statutorily required. Absent the allegations of facts to support the conclusion that tender of these checks was in good faith or the product of any negotiation of a dispute over the debt, Plaintiff's "naked assertion[s] devoid of further factual enhancement" do not state a claim and the action must be dismissed under Rule 12(b)(6).

CONCLUSION

For the reasons stated herein, the Court should dismiss this action with prejudice on the grounds that the Complaint fails to allege a claim upon which relief may be granted.

This the 7th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2017 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such to the following:

None.

And I hereby certify that I have mailed the foregoing to the following non CM/ECF participants:

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